Supreme Court, U.S.
FILED
APR 15 2002
OFFICE OF THE CLERK

No. 01–1351

IN THE

Supreme Court of the United States

HALLEEN CHEVROLET, INC., *et al.*,
Petitioners,

v.

GENERAL MOTORS CORPORATION, *et al.*,
Respondents.

On a Writ of Certiorari to the Court of Appeals of Ohio, Tenth Appellate District

RESPONDENTS' BRIEF IN OPPOSITION TO HALLEEN CHEVROLET'S PETITION FOR WRIT OF CERTIORARI

STEPHEN C. FITCH
(Counsel of Record)
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 334-6120

Counsel for the Respondent Fairchild Chevrolet

JEFFREY J. JONES
(Counsel of Record)
DOUGLAS M. MANSFIELD
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3939

Counsel for the Respondent General Motors Corporation

[Additional Counsel Listed on Inside Cover]

L. JOSEPH LINES, III
(Of Counsel)
GENERAL MOTORS
CORPORATION
Mail Code 482-026-601
400 Renaissance Center
P.O. Box 400
Detroit, MI 48265-4000

Of Counsel for the
Respondent General Motors
Corporation

QUESTIONS PRESENTED

1. Whether a substitute examiner in an administrative proceeding can issue a recommendation based on a review of the record where there are no credibility issues over which the demeanor of the witnesses is of any importance?

2. Whether an administrative agency can review the record from an evidentiary hearing before an examiner and adopt the examiner's recommendation as its own decision without holding an entirely new evidentiary hearing?

PARTIES TO THE PROCEEDINGS

Respondent General Motors Corporation has no parent corporation and no publicly held company owns 10 percent or more of its stock. Respondent Fairchild Chevrolet has no parent corporation and no publicly held company owns 10 percent or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. The Court Of Appeals' Decision Is Consistent With This Court's Precedents 3

B. The Prevailing Rule Throughout The Country Is Consistent With The Court of Appeals' Decision .. 9

C. Separate And Apart From The Other Defects In The Petitioners' "Due Process" Argument, There-Were No Disputed Issues Below Over Which Demeanor Was Of Any Importance 16

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Adams v. Industrial Commission of Arizona, 710 P.2d 1073(Ariz. 1985) 15
Addison v. Review Board of Ind. Employment Security, 397 N.E.2d 1037 (Ind. App. 1979) 16
Appalachian Power Co. v. Federal Power Commission, 328 F.2d 237 (4th Cir. 1964), *cert. denied*, 379 U.S. 829 (1964) 13, 14
Appeal of Dell, 668 A.2d 1024 (N.H. 1995) 9
Armstrong v. Manzo, 380 U.S. 545 (1965) 4
Art National Manufacturers Distributing Co. v. Federal Trade Commission, 298 F.2d 476 (2nd Cir. 1962), *cert. denied*, 370 U.S. 939 (1962) 13
Capitol Mortgage Bankers v. Cuomo, 222 F.3d 151 (4th Cir. 2000) 5
Chemical Waste Management, Inc. v. EPA, 873 F.2d 1477 (D.C. Cir. 1989) 5
Citizens for Rewastico Creek v. Commissioners of Hebron, 508 A.2d 493 (Md. 1986) 10, 17
Dworkin v. PUCO, 111 N.E.2d 389 (Ohio 1953) 12
FDIC v. Bank of Coushatta, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 502 U.S. 857 (1991) 5
Foster v. Ripley, 645 F.2d 1142 (D.C. Cir. 1981) 5
Frumkin v. Kent State University, 626 F.2d 19 (6th Cir. 1980) 5
Gamble-Skogmo, Inc. v. Federal Trade Commission, 211 F.2d 106 (8th Cir. 1954) 14, 15
Goss v. Lopez, 419 U.S. 565 (1975) 5
In re Grimm, 635 A.2d 456 (N.H. 1993) 15
Laughlin, et al. v. PUCO, 216 N.E.2d 60 (Ohio 1966) 6, 11, 12
Lewis v. Statewide Grievance Committee, 669 A.2d 1202 (Conn. 1996) 9

TABLE OF AUTHORITIES

Page

Matthews v. Eldridge, 424 U.S. 319 (1976) 5
Messer v. Snohomish Cty. Board of Adj., 578 P.2d 50 (Wn. 1978) 9
Morgan v. United States, 298 U.S. 468 (1936) 6, 7, 8
Morgan v. United States, 313 U.S. 409 (1941) 8
Morrisey v. Brewer, 408 U.S. 471 (1972) 4
NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333 (1938) 5
National Labor Relations Board v. Stocker Manufacturing Co., 185 F.2d 451 (3rd Cir. 1950), ... 13, 15
New England Coalition v. Nuclear Regulatory Commission, 582 F.2d 87 (1st Cir. 1978) 12, 13, 17
New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96 (1978) 3
PBGC v. LTV, 496 U.S. 633 (1990) 7
Peak v. Unemployment Compensation Board of Review, 501 A.2d 1383 (Pa. 1985) 9
Pigrenet v. Boland Marine & Manufacturing Co., 631 F.2d 1190 (5th Cir. 1980) 14
Pigrenet v. Boland Marine & Manufacturing Co., 656 F.2d 1091 (5th Cir. 1981) 14
Quivara Mining Co. v. NRC, 866 F.2d 1246 (10th Cir. (1989) 5
Ritchie Photographic v. Limbach, 644 N.E.2d 312 (Ohio 1994) 12
Rosales v. Department of Labor, 40 Wn. App. 712, 715 (1985) 9
SBC Communications, Inc. v FCC, 56 F.3d 1484 (D.C. Cir. 1995) 9
Schmidt v. Beeson Plumbing & Heating, 869 P.2d 1170 (Alaska 1994) 9

TABLE OF AUTHORITIES

Page

In re Seacoast Anti-Pollution League, 490 A.2d 1329 (N.H.1984) 15
State ex rel. Halleen Chevrolet, Inc. v. Larry H. James, 712 N.E.2d 759 (Ohio 1999) 2
State ex rel. Ohio Building Restoration v. Industrial Commission of Ohio, 593 N.E.2d 1388 (Ohio 1992) . 11
State ex rel. Ormet Corporation v. Industrial Commission of Ohio, 561 N.E.2d 920 (Ohio 1990) . 11
Stevens Chevrolet, Inc. v. Commission on Human Rights, 498 A.2d 546 (D.C. Ct. App. 1985) 16
Twin City Milk Producers Ass'n v. McNutt, 122 F.2d 564, 569 (8th Cir. 1941) 15
United States v. Florida East Coast Railway, 410 U.S. 224 (1973) 4
University Community Hospital v. Department of Health and Rehab. Services, 555 So.2d 922 (Fla. App. 1990) . 9
University of Missouri v. Horowitz, 435 U.S. 78 (1978) .. 5
Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129 (2nd Cir.), *cert. denied*, 389 U.S. 839 (1967) 13

Statutes

5 U.S.C. § 554(d) 13
Chapter 4517 7
Ohio Rev. Code Ann. § 4517.51 (Anderson 2001) 1
Ohio Rev. Code Ann. § 4517.58 (Anderson 2001) .. 3, 7, 8
Ohio Rule Civ. P. 32 6

Miscellaneous

Davis, K. *Administrative Law Treatise* § 17.17 (2d ed. 1980) 10, 11
Davis, K. *Administrative Law Treatise* § 9.1, et seq. (3d ed. 1994) 11

TABLE OF AUTHORITIES

Page

Koch, C., *Administrative Law and Practice* (2d ed. 1997) 11

STATEMENT OF THE CASE

Petitioners seek review of an unpublished Ohio court of appeals decision, which affirmed the trial court's decision upholding an administrative board order finding "good cause" to allow an existing Chevrolet dealer to relocate its operations. The court of appeals' decision, which the Ohio Supreme Court declined jurisdiction to review, decides no significant legal questions, but merely reflects a straightforward application of settled Ohio law. That decision applied an unbroken line of Ohio Supreme Court cases over five decades to decide that a substitute hearing examiner could issue a recommendation to an administrative board after reviewing transcripts of the hearing when the initial hearing examiner became unavailable to finish the case. The court of appeals' decision is consistent with the prevailing view around the country and this Court's decisions over the last 70 years on what process is due in administrative proceedings. Further review in this Court is therefore unwarranted.

Petitioners Halleen Chevrolet, Inc., et al. ("Halleen") filed an administrative protest over Respondent Fairchild Chevrolet's ("Fairchild's") plans to relocate its operations with the Ohio Motor Vehicle Dealer Board (the "Dealer Board"). A hearing was held before Hearing Examiner Robert Carter to determine whether Fairchild had "good cause" to relocate. OHIO REV. CODE ANN. § 4517.51 (Anderson 2001). The proceedings were transcribed, with 13 witnesses testifying either live or by way of deposition transcripts. Over 100 exhibits were admitted into the record. The hearing examiner, however, later stopped communicating with the Dealer Board and failed to issue any recommended ruling over eight months after the trial concluded. To comply with Ohio law—which imposes strict timetables for completing all administrative proceedings—the Dealer Board reassigned all of Mr. Carter's cases to new hearing examiners.

The substitute hearing examiner assigned to this case, Larry H. James—a distinguished and experienced hearing examiner for the Dealer Board—reviewed the entire record of the proceedings, carefully analyzed the exhibits, personally conducted a day-long inspection of the geographic areas in Cleveland and dealerships at issue with counsel and all parties present, and then heard another nearly full day of oral argument by counsel on all of the evidence presented at the hearing previously held.

After reviewing settled Ohio law, the substitute hearing examiner found that he did not need all of the witnesses—several of whom resided outside of Ohio—to travel back to Ohio to give the same testimony that they previously gave. Instead, Mr. James advised the parties that he would first review the record and then, based on that review, determine if he needed to hear any additional testimony to decide any of the questions presented. Halleen thereafter filed a petition for a writ of prohibition with the Ohio Supreme Court to compel Hearing Examiner James to retry the case and rehear all of the same witnesses again "live." *State ex rel. Halleen Chevrolet, Inc. v. Larry H. James*, 712 N.E.2d 759 (Ohio 1999). In the briefs filed with the Ohio Supreme Court in that action, the Dealer Board noted that the evidence presented at the initial hearing consisted primarily of objective "statistical" data that was easily subject to review by way of analyzing the transcripts and exhibits. After briefing on the issues, the Ohio Supreme Court dismissed Halleen's petition, authorizing Mr. James to proceed. *Id.*

After completing his review of the record, Mr. James determined that he did not need to hear any additional testimony to resolve the issues presented. As he found in his recommendation—which was 29 pages long and contained 93 paragraphs of findings and conclusions—the evidence clearly established "good cause" for Fairchild's planned relocation. After reviewing Halleen's objections to the hearing

examiner's recommendation, the Dealer Board adopted the recommendation without modification by operation of law, OHIO REV. CODE ANN. § 4517.58 (Anderson 2001), and issued an order to that effect. (Pet. App. 51a.) After reviewing the record again, the Franklin County, Ohio Court of Common Pleas affirmed the Dealer Board's decision. (Pet. App. 24a.) The Franklin County, Ohio Court of Appeals then reviewed the record yet again and unanimously affirmed the trial court's decision. (Pet. App. 1a.) The court of appeals further noted that "Halleen fail[ed] to point to any specific instances in the record where witness credibility was at issue." (Pet. App. 8a.) Halleen thereafter attempted to invoke the Ohio Supreme Court's discretionary jurisdiction to review the case, which was declined. (Pet. App. 49a.) Thus, five different tribunals have uniformly rejected the same arguments that Halleen makes here, repeatedly finding after reviewing the record that Halleen's arguments are not well taken. Halleen's petition should accordingly be denied.[1]

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals' Decision Is Consistent With This Court's Precedents.

Petitioners seek review based on their contention that an administrative board, which decides a case based on a hearing

---

[1] Notably, the litigation and multiple appeals filed by Halleen in this matter have undermined the entire purpose of the statutory timetable governing this administrative proceeding, which was designed to conclude within 180 days from the initial filing. Fairchild has now been precluded from completing a simple business relocation for over five years. In *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96 (1978), this Court noted that the filing of an administrative protest, as here, acted as an injunction precluding the proposed relocation without any prior showing of any likelihood of success on the merits. The Court reasoned that this procedure was acceptable because the statute at issue provided for a "prompt" resolution of the matter. Respondents respectfully submit that five years of delay is enough.

examiner's recommendation, may not replace the hearing examiner after the first examiner becomes unavailable, unless the subsequent examiner re-hears all the same witnesses again "live." In rejecting that contention, the court of appeals did not deny petitioners any "basic tenet [*sic*] of American law." (Pet. 11.) Rather, the court of appeals adhered to settled Ohio law, which squarely comports with this Court's time-tested principles concerning what constitutes due process in administrative proceedings.

It is settled law throughout the country that an administrative hearing officer need not actually hear or see the witnesses testify live, so long as the decision-maker (the agency) considers and appraises the evidence that is taken, which it may do by relying on subordinates that singly or collectively assemble the record and render a decision. In *United States v. Florida East Coast Ry.*, 410 U.S. 224 (1973), for example, this Court held that a procedure consisting of notice of the issues presented and an opportunity to present evidence and arguments in writing was sufficient to satisfy both the statutory and constitutional requirements that the agency provide a "hearing" before it took action that imposed substantial costs on a railroad. The Court explicitly rejected the argument that any "hearing" conducted to resolve a factual dispute must include the right to present oral evidence and the right to confront and cross-examine witnesses, *id.* at 241-43, although in this case Halleen was also given all of those rights as well at the initial hearing.

Petitioners argue that the term "hearing" requires that the substitute hearing examiner conduct a *second* trial-type hearing in the proceedings before the administrative agency, but that proposition has been consistently rejected by the Court. The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). "(D)ue process is flexible and calls for such procedural protections as the particular situation demands."

Morrisey v. Brewer, 408 U.S. 471, 481 (1972). Due process in administrative proceedings does not require that the testimony be evaluated by an officer who heard and observed the witnesses "live." *E.g., Matthews v. Eldridge*, 424 U.S. 319 (1976) (Social Security Administration procedure used to determine benefits based principally upon questionnaires with no opportunity for an oral evidentiary hearing prior to termination of disability benefits did not violate due process); *see also NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S. 333 (1938) (due process afforded where trial examiner failed to issue recommendation to board and board made findings and issued decision solely on basis of the transcribed record).

This Court, in fact, has repeatedly affirmed that a written hearing alone comports with due process in many decision-making contexts. *E.g., University of Missouri v. Horowitz*, 435 U.S. 78 (1978) (deprivation of education in the form of expulsion from a university); *Goss v. Lopez*, 419 U.S. 565 (1975) (deprivation of education in the form of a 10-day suspension from high school). *See also Capitol Mortgage Bankers v. Cuomo*, 222 F.3d 151 (4th Cir. 2000) (deprivation of right to issue government-insured mortgages); *FDIC v. Bank of Coushatta*, 930 F.2d 1122 (5th Cir. 1991), *cert. denied*, 502 U.S. 857 (1991) (order requiring bank to increase capital by $725,000); *Chemical Waste Management, Inc. v. EPA*, 873 F.2d 1477 (D.C. Cir. 1989) (deprivation of money in the form of an order to take corrective actions based on hazardous waste release); *Quivara Mining Co. v. NRC*, 866 F.2d 1246 (10th Cir. 1989) (deprivation of property in the form of imposition of costly regulatory requirement); *Foster v. Ripley*, 645 F.2d 1142 (D.C. Cir. 1981) (deprivation of government job); *Frumkin v. Kent State University*, 626 F.2d 19 (6th Cir. 1980) (deprivation of government job).

The Federal and Ohio Rules of Civil Procedure also allow parties to read deposition transcripts to judges and juries under many different circumstances without calling the witnesses "live." In this case, all of the witnesses that testified at the

first hearing in this matter resided outside Franklin County, Ohio, where Hearing Examiner James conducted the continued proceedings. Under Ohio Rule Civ. P. 32, therefore, all of the witnesses could have testified by deposition even in a civil action in a court of law. It would make no sense to say that administrative agencies—which follow more informal and expeditious procedures—cannot review transcripts when judges and juries could have done so in the circumstances present here. In fact, Halleen's "due process" argument that all witnesses must appear "live" would render the use of deposition transcripts unconstitutional. That is untenable.

Consistent with this Court's many rulings, Ohio law provides that an administrative agency may substitute hearing examiners to fulfill its obligations and the substitute hearing examiner may review the record and issue a recommendation without having to "re-try" the entire case all over again. *Laughlin, et al. v. PUCO*, 216 N.E.2d 60, 61 (Ohio 1966) ("[i]t is not essential that a person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding."). The court of appeals simply followed these time-tested principles in rejecting petitioners' contention that due process required they be given an entirely new trial. The Dealer Board's assignment of a substitute hearing examiner who reviewed the entire record, personally inspected the relevant geographic areas, heard argument from counsel in a nearly day-long hearing, and then prepared a detailed and comprehensive 29-page recommended order to the Dealer Board, comports with this precedent, as the court of appeals' decision properly reflects.

Petitioners cite this Court's decision in *Morgan v. United States*, 298 U.S. 468 (1936) (*Morgan I*), for the proposition that "[t]he one who decides must hear." (Pet. 12.) Petitioners construe that bare quote to mean that a hearing examiner must hear all the witnesses "live," but that mischaracterizes the law.

Petitioners ignore *Morgan I's* progeny and further language in the decision itself that confirms that petitioners' proposition never was the law. This Court never ruled that the one who decides must hear the witnesses testify "live." To the contrary, this Court noted that the "[e]vidence may be taken by an examiner." *Id.* at 481. And this Court never said that the one who decides must even read the testimony, for it added that the "[e]vidence thus taken may be sifted and analyzed by competent subordinates." *Id.* The Court in *Morgan I* simply ruled that the one who decides must consider the evidence. This Court long ago rejected the petitioners' contention that due process requires more than what they were afforded, as the court of appeals below correctly ruled. *See also PBGC v. LTV*, 496 U.S. 633, 654 (1990) (an agency need only take whatever steps are necessary "to provide an explanation that will enable the court to evaluate the agency's rationale at the time of decision.").

Likewise, the Dealer Board's adoption of the hearing examiner's recommendation without holding an entirely new hearing comports with these same principles. Halleen mischaracterizes Chapter 4517 of the Ohio Revised Code when it claims a "due process violation" because the Dealer Board "failed to deliberate" on the hearing examiner's recommendation. The Dealer Board did review the hearing examiner's recommendation, the petitioners' objections, and the record, but determined that it "declined to further deliberate on this matter." (Pet. App. 53a.) In this circumstance, the statute provides that the Dealer Board need not issue a separate decision if the Dealer Board opts to adopt the hearing examiner's recommendation. Section 4517.58 of the Ohio Revised Code specifically provides that "[i]f the Board fails to act within 30 days after the Board receives a proposed decision from the hearing officer . . . the proposed decision shall be considered approved." In this case, the Dealer Board adopted the hearing examiner's recommendation

without modification and issued a separate order approving the recommendation. (Pet. App. 51a.)

As the court of appeals correctly found, that process is consistent with due process guarantees. There is no requirement under the Court's precedents that the deciding board must observe the witnesses before making an agency determination. Even under *Morgan I*, the agency is expressly permitted to fulfill its responsibilities through the use of subordinates. Subordinates may take the evidence and analyze and sift through it on behalf of the deciding board. *Morgan*, 298 U.S. at 481. Under the Court's fourth *Morgan* decision, moreover, a deciding board need not obtain personal mastery of the evidence and facts in order for the agency to render a just and sound decision. *Morgan v. United States*, 313 U.S. 409 (1941). A deciding board can, and often must, defer to trusted subordinates.

As the court of appeals correctly ruled, the Dealer Board's statutory adoption of the hearing examiner's recommendation comports with due process guarantees because petitioners were afforded the opportunity for a meaningful hearing and consideration of their claims. Petitioners were accorded an initial lengthy "full trial"-type hearing and then a subsequent day-long hearing by a second hearing examiner during which the substitute examiner heard counsel's arguments on all the evidence presented—far more "due process" than is customarily provided in administrative proceedings. The hearing examiner's recommendation was approved by the Dealer Board after its review by operation of law. OHIO REV. CODE ANN. § 4517.58 (Anderson 2001). As this Court's precedents reflect, due process does not require that petitioners be given a second hearing before the Dealer Board. The court of appeals properly relied on settled precedent in rejecting the petitioners' claim to the contrary.

B. The Prevailing Rule Throughout The Country Is Consistent With The Court of Appeals' Decision.

Petitioners argue that the court of appeals' decision contradicts the "vast majority of federal circuit courts and other highest state courts." (Pet. at 11.) Petitioners even go so far as to contend that "[f]ederal courts in the First, Second, Third, Fourth, Fifth and Eighth Circuits have explicitly stated that a single hearing examiner cannot be replaced by a substitute hearing examiner, who does not observe the character and demeanor of the witnesses, where material factual issues are unresolved." (Pet. at 11.) That statement, however, misstates those circuit court decisions. In fact, virtually every decision cited by petitioners supports the court of appeals' decision below.

Contrary to petitioners' arguments, the prevailing view throughout the country is that the decision-maker in administrative proceedings need not hear the witnesses first-hand, so long as the hearing officer or agency reviews and considers the record. *See, e.g., Appeal of Dell*, 668 A.2d 1024, 1033-34 (N.H. 1995) (board can issue decision without hearing witnesses live); *Lewis v. Statewide Grievance Committee*, 669 A.2d 1202, 1208-09 (Conn. 1996) (agency members allowed to review transcript); *Rosales v. Department of Labor*, 40 Wn. App. 712, 715 (1985) (upheld substitution of hearing examiner and dismissed due process claim as "contrary to the bulk of judicial authority"); *Schmidt v. Beeson Plumbing & Heating*, 869 P.2d 1170, 1177-78 (Alaska 1994) (agency may "hear" evidence by reviewing record); *Messer v. Snohomish Cty. Bd. of Adj.*, 578 P.2d 50, 59 (Wn. 1978) (board can review record); *Peak v. Unemployment Compensation Board of Review*, 501 A.2d 1383, 1389 (Pa. 1985) (administrative agencies may review record); *University Community Hosp. v. Dept. of Health and Rehab. Services*, 555 So.2d 922, 923-24 (Fla. App. 1990) (same); *SBC Communications, Inc. v FCC*, 56 F.3d 1484, 1496-97 (D.C.

Cir. 1995) (administrative disputes with respect to economic facts do not require oral hearing).

One of the decisions cited by petitioners actually highlights the prevailing rule. In *Citizens for Rewastico Creek v. Commissioners of Hebron*, 508 A.2d 493 (Md. 1986), Maryland's highest court rejected the same line of argument advanced by petitioners in this case, finding no due process violation where a substitute examiner declined to re-hear all of the witnesses "live." As the court noted, the "general rule is that in the absence of specific statutory direction to the contrary the deciding member or members of an administrative or quasi-judicial agency need not hear the witnesses testify." *Id.* 499 (citations omitted). As the court summarized the law, the "general rule" is that "it is enough if those who decide have considered and appraised the evidence." *Id.*

The prevailing view, moreover, is reflected in multiple treatises. As Professor Davis noted:

> 'The employee who presides at the reception of evidence pursuant to section 556 . . . shall make the recommended decision or initial decision required by section 557 . . . unless he becomes unavailable to the agency.' But even what is called an "initial" decision is only a recommendation, because in reviewing it the agency under § 557(b) has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule.' *That means that the normal system is fundamentally one in which the decision is made, even when demeanor of witnesses is vital, by officers who have neither seen nor heard the witnesses; the decision is not made by the officer who has seen and heard the witnesses.*

Davis, K. *Administrative Law Treatise* § 17.17 (2d ed. 1980) (emphasis added). The current edition of Professor Davis' treatise likewise notes that courts throughout the country have acknowledged that administrative agencies can act after

reviewing transcribed testimony. Davis, K. *Administrative Law Treatise* § 9.1, et seq. (3d ed. 1994). Other treatises on administrative law have reached the same conclusion. *See also* Koch, C., *Administrative Law and Practice* (2d ed. 1997) § 5.23.

Ohio law reflects the general rule that agencies may substitute hearing examiners if the initial hearing examiner becomes unavailable and the substitute examiner reviews and appraises the evidence. The Ohio Supreme Court has repeatedly rejected the requirement that petitioners advocate—*i.e.*, requiring every witness to be "live" in every administrative proceeding. In *State ex rel. Ormet Corporation v. Industrial Commission of Ohio*, 561 N.E.2d 920 (Ohio 1990), for example, the Ohio Supreme Court rejected petitioners' argument, finding that the law does not require "personal attendance" at the administrative hearing so long as the evidence is "considered and appraised." *Id.* at 922-23. *See also State ex rel. Ohio Building Restoration v. Industrial Commission of Ohio*, 593 N.E.2d 1388, 1389 (Ohio 1992) (agency commissioner need not hear witnesses at hearing so long as he did in "some meaningful manner, consider evidence obtained at hearing.") (citations omitted).

Likewise, in *Laughlin*, 216 N.E.2d at 60, the Ohio Supreme Court directly addressed the issue here. In that case, the Public Utilities Commission of Ohio assigned a hearing examiner to hear a protest before the Commission. The initial hearing examiner (who started the hearing) resigned and another hearing examiner completed the hearing. The second hearing examiner made no findings and the transcript and exhibits were transferred to a third hearing examiner who issued a recommendation to the Commission. The appellants in *Laughlin* contended that they were denied a fair hearing because the Commission assigned a hearing examiner to prepare a recommendation who had not presided at the hearing. *Id.* As the Ohio Supreme Court held, however, "[that] contention is without merit. It is not essential that a

person who prepares findings and recommendations in an administrative proceeding hears the evidence, if he reviews and examines the record of the proceeding." *Id.*

In *Ritchie Photographic v. Limbach*, 644 N.E.2d 312, 313 (Ohio 1994), the Ohio Supreme Court decided the same issue and again rejected the argument advanced by petitioners. In that case, one hearing examiner took testimony and the second hearing examiner decided the case by examining the record. The Ohio Supreme Court rejected the appellants' claims that the substitution of hearing examiners constituted a denial of "due process." *See also Dworkin v. PUCO*, 111 N.E.2d 389 (Ohio 1953) (no due process violation where agency members made a decision based solely on transcripts).[2]

The purported "conflict" that Halleen tries to create, moreover, simply does not exist. The First Circuit's decision in *New England Coalition v. Nuclear Regulatory Comm'n*, 582 F.2d 87 (1st Cir. 1978), does not provide the conflict that petitioners contend. In that case, the court held that due process was *not* violated by the substitution of hearing examiners even where there were purported credibility issues involving the expert witnesses. While the court noted the Administrative Procedure Act's ("APA's") preference for

---

[2] Petitioners try to distinguish *Laughlin* and *Ritchie Photographic* by claiming that the underlying issues present in those cases were based "entirely upon questions of law," but that is not true. There is no language in *Laughlin* or *Ritchie* suggesting that there were no "credibility" issues present. The complaining party in *Laughlin* argued that the hearing examiner prepared "findings" and resolved factual issues without hearing and observing the witnesses. *Laughlin*, 216 N.E.2d at 60. *Ritchie Photographic* was likewise not limited to the resolution of a legal issue. The appellant specifically claimed that the agency "erred in its *factual* conclusion" and argued that it was denied due process because "the BTA replaced the attorney-examiner who had conducted the evidentiary hearing with another attorney-examiner who worked from a cold record' to decide [the case]." 644 N.E.2d at 313. That is the same claim petitioners are making here.

hearing decisions made by someone who heard the evidence, it also expressly recognized, as does the APA itself, that decisions are sometimes made by substitute hearing examiners because the initial examiner becomes "unavailable to the agency." *Id.* at 99-100; 5 U.S.C. § 554(d).

The Second Circuit's decision likewise does not support the petitioner's contention of a conflict with the court of appeals' decision below. In *Art National Manufacturers Distributing Co. v. Federal Trade Commission,* 298 F.2d 476, 477 (2nd Cir. 1962), *cert. denied*, 370 U.S. 939 (1962), the Second Circuit ruled that there was *no* due process violation in substituting hearing examiners because the Commission made its findings based on uncontroverted evidence not involving credibility, just as the court of appeals found below. The Second Circuit, moreover, five years after its decision in *Art National Manufacturers*, expressly ruled that an administrative hearing examiner need not see the witnesses testify "live," even where credibility is an issue. *Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129, 132 (2nd Cir.), *cert. denied*, 389 U.S. 839 (1967). Current law in the Second Circuit thus directly contradicts petitioners' contention.

Likewise, in *National Labor Relations Board v. Stocker Mfg. Co.*, 185 F.2d 451 (3rd Cir. 1950)—another case cited by petitioners—the Third Circuit found *no* due process violation when the trial examiner died before preparing a report and the substitute examiner issued his recommendation to the board based only on a review of the transcripts. As the Court noted: "The doctrine of these cases clearly permits the Board to make its findings and predicate its order upon the written record without hearing the witnesses testify or availing itself of findings and recommendations prepared by the officer who heard and observed the witnesses testify." *Id.* at 453.

The Fourth Circuit's decision in *Appalachian Power Co. v. Federal Power Commission*, 328 F.2d 237 (4th Cir. 1964), *cert. denied*, 379 U.S. 829 (1964), similarly does not support

any conflict. In that case, the Fourth Circuit found no due process violation where hearing examiners were substituted in an administrative proceeding. While the court did suggest in dicta that the substitution of trial examiners "might be improper" where the demeanor of witnesses is an important factor, *id.* at 240, it never reached that question because, as with the court of appeals below, it determined that demeanor was not an issue in the case. The court of appeals here likewise ruled that petitioners never identified any issues below where demeanor was of any importance. (Pet. App. 8a.) Although the Fourth Circuit's decision reflects a now-outdated view of accepted practice in administrative proceedings, it only confirms the propriety of the court of appeals' decision below.

Petitioners further claim that the Fifth Circuit's decision in *Pigrenet v. Boland Marine & Manufacturing Co.*, 631 F.2d 1190 (5th Cir. 1980) illustrates a conflict. It does not. Petitioners fail to tell this Court that an en banc panel of the Fifth Circuit subsequently *reversed* its earlier decision in that case. *Pigrenet v. Boland Marine & Manufacturing Co.*, 656 F.2d 1091 (5th Cir. 1981). The court vacated its earlier decision that there was a due process violation, finding that the complainant had waived that argument and the court therefore did not decide it. *Id.* at 1095.

The Eighth Circuit's older decision from 1954 in *Gamble-Skogmo, Inc. v. Federal Trade Commission*, 211 F.2d 106 (8th Cir. 1954) is the only circuit decision that petitioners cite that comes anywhere close to supporting their position, but even it does not do so. In that case, the Eighth Circuit ruled that the APA generally would not require a substitute hearing examiner to engage in a *de novo* hearing unless a credibility evaluation was necessary. *Id.* at 114. The court interpreted the APA to "establish the general practice and policy in the examiner system of having recommended or initial administrative decisions made by the trial examiner who had received the evidence . . . as a measure of ensuring proper

credibility evaluation." *Id.* The court recognized, however, that "a change in personnel occurring during the course of or at the close of an administrative hearing does not as such give rise to constitutional repugnance in a decision or order made by the administrative tribunal on the basis of the previous hearing." *Id.* at 112, *citing Twin City Milk Producers Ass'n v. McNutt*, 122 F.2d 564, 569 (8th Cir. 1941); *NLRB v. Stocker Mfg. Co.*, 185 F.2d 451, 453 (3rd Cir. 1950). The court squarely recognized that the "unavailability" of the initial examiner may necessitate the substitution of examiners without creating any due process violation. The Eighth Circuit's decision thus does not evidence the sort of dissension among the circuits that would warrant this Court's review.

The state court decisions that petitioners cite likewise do not reflect any conflict among the courts below. Those cases nearly all confirm the prevailing rule, and, to the extent they do not, they are based on particular statutes or issues that require the fact-finder to resolve credibility issues first-hand. *In re Grimm*, 635 A.2d 456 (N.H. 1993), for instance, the New Hampshire Supreme Court analyzed peculiar procedural issues relating to that case (there, the issue was whether sexual contact had occurred), but the Court reaffirmed that "the general rule in administrative proceedings is that an administrative officer may act on a written record of testimony by witnesses whom he has not personally seen or heard." *Id.* at 459 (citations omitted); *see also In re Seacoast Anti-Pollution League*, 490 A.2d 1329, 1335 (N.H. 1984) (noting general rule that an administrative officer may act on a written record and affirming review of record where experts were in conflict because review is a function of logical analysis). The *Adams v. Industrial Comm'n of Arizona*, 710 P.2d 1073 (Ariz. 1985) case, as well, limited its holding to the narrow issue of whether a substituted ALJ could *reverse* a prior benefits award. Even those cases that required "live" testimony did so only when the honesty of two witnesses was in direct conflict, generally involving completely contradictory accounts of a

single conversation or incident. *See, e.g., Addison v. Review Bd. of Ind. Employment Sec.*, 397 N.E.2d 1037 (Ind. App. 1979) (conflicting testimony on reason employee was fired); *Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d 546 (D.C. Ct. App. 1985) (same). Those cases thus do not support any conflict here.

In short, petitioners fail to identify any legal authority contradicting the court of appeals' decision, any legitimate circuit split on the issues raised, or any other reason to justify this Court's review of the disposition of petitioners' claims. To the contrary, the court of appeals' decision simply applied the prevailing rule throughout the country.

C. Separate And Apart From The Other Defects In The Petitioners' "Due Process" Argument, There Were No Disputed Issues Below Over Which Demeanor Was Of Any Importance.

Even accepting all of petitioners' concerns as legitimate grounds for review, this case would not present the right vehicle for assessing the questions presented by petitioners.

Petitioners argue that conflicting questions of "demeanor" were somehow important, but, as the court of appeals correctly found, there was not a single evidentiary issue of any kind below over which the hearing examiner had to decide the "honesty" of a witness or otherwise assess his or her demeanor. (Pet. App. 8a.) The trial consisted almost exclusively of differing opinions over undisputed facts and objective data, which Hearing Examiner James could easily analyze from the record. "Good cause," which the statute required for Fairchild's planned relocation, existed for the proposed relocation based on the undisputed facts alone. As the Dealer Board noted in its papers to the Ohio Supreme Court in Halleen's prohibition proceedings, the hearing consisted largely of objective data and evidence that could be easily reviewed without regard to demeanor. Halleen, in fact,

concedes that the "raw data in this case was largely unchallenged." (Pet. at 6.)

Although the experts presented differing theories, which required an analysis of the information presented by the parties, the underlying objective data was almost entirely undisputed. The "credibility" of expert opinions is often analyzed through a review of exhibits and deposition transcripts. Numerous decisions—including multiple decisions cited by the petitioners themselves—have repeatedly recognized that demeanor is not important in resolving differing expert opinions. *E.g.*, *New England Coalition on Nuclear Pollution*, 582 F.2d at 100 (credibility of experts is "a function of logical analysis, credentials, data base, and other factors readily discernible to one who reads the record," not of demeanor); *see also Citizens for Rewastico Creek*, 508 A.2d at 502 (same).

After reviewing the entire evidentiary record in this case, Hearing Examiner James correctly determined that he did not need to hear any additional evidence to resolve any questions of "demeanor" or "honesty." Nor did Hearing Examiner James need to make such determinations to reach a decision in this matter. Thus, even if Ohio law had not already addressed the petitioners' claimed error, that claimed error would have no application here. To the extent the decisions the petitioners cite on credibility determinations even reflect a conflict of any kind, there is no such issue to resolve here.

Notably, although the petitioners now argue that the second hearing examiner could not review transcripts of testimony, that entire line of argument contradicts their own conduct below. During the hearing before the first hearing examiner, Halleen introduced multiple deposition transcripts into the record and asked the hearing examiner to review those transcripts and consider them in reaching a decision. Those witnesses addressed multiple "factual" issues, but never testified live before the first hearing examiner.

Given the court of appeals' determination that no credibility issues were ever at issue below, this case does not even present an adequate vehicle for review of the questions presented by petitioners, rejecting any need for review by this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully request that this Court deny petitioners' writ.

Respectfully submitted,

STEPHEN C. FITCH
(Counsel of Record)
17 South High Street
Suite 900
Columbus, Ohio 43215
(614) 334-6120

Counsel for the Respondent Fairchild Chevrolet

JEFFREY J. JONES
(Counsel of Record)
DOUGLAS M. MANSFIELD
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3939

Counsel for the Respondent General Motors Corporation

L. JOSEPH LINES, III
(Of Counsel)
GENERAL MOTORS CORPORATION
Mail Code 482-026-601
400 Renaissance Center
P.O. Box 400
Detroit, MI 48265-4000

Of Counsel for the Respondent General Motors Corporation